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No. 96-1352

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THEODORE ROBERT WILLOUGHBY,
Petitioner,

v.

POTOMAC ELECTRIC POWER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PATRICIA R. AMBROSE
WILLIAM P. FLANAGAN*
AMY FOLSOM KETT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5715
Counsel for Respondent

* Counsel of Record

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QUESTION PRESENTED

Whether the unanimous court of appeals decision correctly held that the district court did not abuse its discretion in denying petitioner's motion for leave to amend his complaint on the ground that the proposed amendment lacked merit and therefore would have been futile.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Potomac Electric Power Company ("PEPCO" or "the Company")[1] respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit.

This case involves nothing more than the straightforward application of settled standards concerning amendments to pleadings under Federal Rule of Civil Procedure 15(a). The court of appeals concluded that the district court did not abuse its discretion in denying petitioner Theodore Robert Willoughby ("Willoughby") leave to amend his complaint. The court of appeals agreed with the district court that the

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[1] Pursuant to Supreme Court Rule 29.6, PEPCO states that it has no parent companies or nonwholly-owned subsidiaries.

proposed amendment would have been futile because Willoughby's allegations and the evidence already adduced in the litigation demonstrated that the new claim he sought to assert had no prospect of success on the merits.

This holding has no significance beyond the confines of this specific litigation. Willoughby's effort to manufacture a conflict with other courts of appeals is unavailing, because the courts of appeals repeatedly have held that a motion to amend is properly denied when the proposed amendment lacks merit and would not survive summary judgment. In all events, the court of appeals' determination that the district court did not abuse its discretion is correct. The petition should be denied.

COUNTERSTATEMENT

PEPCO is a public utility company serving the Washington, D.C., metropolitan area. J.A. 8; 24.[2] Willoughby, a white male, worked as a supervisor in PEPCO's drafting department. Pet. App. 2a. He was discharged in 1993 after an internal investigation of race and sex discrimination complaints by his subordinates revealed that Willoughby had improperly interfered with an investigation by PEPCO's Equal Opportunity Program (EOP) staff and had made sexist comments, in violation of the Company's EOP policies and affirmative action plan. *Id.* at 3a, 12a; J.A. 295, 300. Following Willoughby's discharge, PEPCO gave his position to another white male. Pet. App. 22a; J.A. 224.

Willoughby sued PEPCO in a complaint filed January 3, 1994. Pet. App. 31a. The complaint alleged numerous contract and tort claims stemming from his discharge, including a claim that he had contractual rights under a consent decree that PEPCO had entered into with black and female employees in a class action lawsuit to which Willoughby was not a party. *Id.* at 2a, 13a.

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[2] "J.A." refers to the Joint Appendix filed in the court of appeals. "Pet. App." refers to the appendix to the Petition for Writ of Certiorari.

PEPCO moved for summary judgment on all counts of the complaint on August 11, 1994. *Id.* at 49a. The Company gave Willoughby extensive discovery, including thousands of pages of documents relevant to his discharge and to the consent decree. *Id.* at 8a; Brief for Appellee Potomac Electric Power Company at 8 n.2. Willoughby opposed the summary judgment motion, Pet. 5, and did not advise the district court that he required further discovery pursuant to Federal Rule of Civil Procedure 56(f). Pet. App. 8a.

On September 29, 1994 -- nearly ten months after the complaint was filed, and after the summary judgment motion was fully briefed -- Willoughby moved to amend his complaint to add a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. Pet. App. 51a, 70a-72a.[3] PEPCO did not consent to the proposed amendment. In its response, the Company argued that "[i]t is highly unlikely that Willoughby's claims of race and sex discrimination will survive a motion for summary judgment" and that "the fact that a white male who was terminated for violating his employer's equal employment policies (and replaced by another white male) even asserts such claims raises serious Rule 11 concerns." *Id.* at 76a. PEPCO reserved its right to challenge the proposed claim, stating only that, because the claim "would on its face apparently survive a motion to dismiss, PEPCO does not challenge it at this time." *Id.* at 77a.

The district court granted PEPCO summary judgment on all of the claims in the original complaint and denied the motion to amend. *Id.* at 13a-28a. Adding a Title VII claim "would * * * be futile," the district court reasoned, because Willoughby could not even establish a prima facie case of discrimination. *Id.* at 22a-23a.

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[3] Willoughby also sought to add claims under 42 U.S.C. § 1981 and the District of Columbia Human Rights Act, D.C. Code §§ 1-2501 to 1-2557. Pet. App. 69a-70a. He did not pursue the section 1981 claim in the court of appeals and does not pursue either claim in this Court.

The court of appeals affirmed both the grant of summary judgment to PEPCO on the original counts and the denial of Willoughby's motion to amend. *Id.* at 3a-10a. It reviewed the ruling on the motion to amend for abuse of discretion. *Id.* at 8a. Citing this Court's decision in *Foman* v. *Davis*, 371 U.S. 178 (1962), the court of appeals observed that "leave to amend should be freely given unless there is a good reason, such as futility, to the contrary." Pet. App. 8a.

The court of appeals concluded that "[f]utility provides a good reason here," because Willoughby could neither establish a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), nor prove his case by direct evidence. Pet. App. 8a-9a. The court reasoned that Willoughby had adduced no evidence that his discharge was based on "any animus against white males" and that he "appear[ed] to have had no prospect of uncovering any such evidence." *Id.* at 8a. Because Willoughby could not succeed on his discrimination claim, the court of appeals held that the district court did not abuse its discretion by denying him leave to add a Title VII claim to his complaint. *Id.* at 8a-9a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED WELL-SETTLED STANDARDS AUTHORIZING DENIAL OF A MOTION TO AMEND WHERE THE AMENDMENT HAS NO PROSPECT OF SUCCESS ON THE MERITS AND THUS WOULD BE FUTILE

The standards governing motions to amend are well settled. A party may amend a pleading after a responsive pleading is filed "only by leave of court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). Although leave to amend "shall be freely given when justice so requires," *id.*, such leave is not automatic. In *Foman*, this Court held that a motion to amend may properly be denied for a variety of reasons, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the

opposing party by virtue of allowance of the amendment, [and] futility of amendment." 371 U.S. at 182.

Applying these settled standards, the D.C. Circuit concluded that Willoughby's proposed amendment would have been futile because the new claim, if allowed, would fail on its merits. This conclusion presents no conflict with decisions of other courts of appeals, as Willoughby contends.

On the contrary, the courts of appeals consistently have held that a motion to amend is properly denied as futile where, as here, the proposed amendment lacks merit and would not survive summary judgment. *See, e.g., Shafer* v. *Preston Mem. Hosp. Corp.*, ___ F.3d ___, ___, ___, 1997 WL 78820, at *2, *8 (4th Cir. Feb. 26, 1997) (affirming district court denial of plaintiff's motion to add new counts to complaint in employment discrimination case because employer "would be entitled to summary judgment on the amended Complaint"); *Executive Leasing Corp.* v. *Banco Popular de Puerto Rico*, 48 F.3d 66, 71 (1st Cir.) (proposed amended complaint "would have been futile * * * because it could not have blocked summary judgment"), *cert. denied*, 116 S. Ct. 171 (1995); *Estate of Porter* v. *Illinois*, 36 F.3d 684, 690 (7th Cir. 1994) ("'An amendment is a "futile gesture" if the amended pleading could not survive a motion for summary judgment'" (quoting *Wilson* v. *American Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989))); *Williams* v. *Little Rock Mun. Water Works*, 21 F.3d 218, 225 (8th Cir. 1994) (proposed amendment to add new claim properly denied as futile where plaintiff failed to "plead in her complaint and present evidence" of facts necessary to prove new claim); *Health-Chem Corp.* v. *Baker*, 915 F.2d 805, 810 (2d Cir. 1990) ("[W]here, as here, there is no merit in the proposed amendments, leave to amend should be denied"); *Gabrielson* v. *Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986) (proposed amendment to assert new cause of action properly denied as futile where new claim "could be disposed of by summary judgment"); *Addington* v. *Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir.) (motion to amend to state new legal theory properly denied as futile where

"plaintiff could not have defeated the defendant's motion for summary judgment on the basis of the amended complaint, if allowed"), *cert. denied*, 454 U.S. 1098 (1981).

Denial of a motion for leave to amend is particularly appropriate where, as here, discovery has been conducted and a summary judgment motion to resolve the claims set forth in the original complaint is already pending. In such cases, courts of appeals have held that the party seeking leave to add new claims or parties must "show that the[] proposed amendments ha[ve] substantial merit and [are] supported by substantial and convincing evidence." *Torres-Matos* v. *St. Lawrence Garment Co.*, 901 F.2d 1144, 1146 (1st Cir. 1990) (internal citation omitted). *Accord Resolution Trust Corp.* v. *Gold*, 30 F.3d 251, 253 (1st Cir. 1994); *Verhein* v. *South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979) (per curiam). As the Ninth Circuit has held, "[t]he timing of [a] motion [to amend] after the parties ha[ve] conducted discovery and a pending summary judgment motion ha[s] been fully briefed, weighs heavily against allowing leave." *Schlacter-Jones* v. *General Tel.*, 936 F.2d 435, 443 (9th Cir. 1991). *See also Resolution Trust*, 30 F.3d at 254 (futile amendments "proffered at the eleventh hour to fend off summary judgment * * * fully merit[] summary rejection").

The cases on which Willoughby relies, Pet. 13-16, are not to the contrary. None of those cases holds, as Willoughby suggests, that a motion to amend must always be granted if the proposed amendment states a cognizable claim for relief, even when it is obvious from the evidence already adduced in the litigation that the claim will fail on its merits.

Gaffney v. *Silk*, 488 F.2d 1248, 1251 (1st Cir. 1973), *Ricciuti* v. *N.Y.C. Transit Authority*, 941 F.2d 119, 123-124 (2d Cir. 1991), and *Jamieson* v. *Shaw*, 772 F.2d 1205, 1211 (5th Cir. 1985), involved the very different situation of a plaintiff seeking to cure a pleading defect or change his legal theory after his initial complaint was dismissed for failure to state a claim. *See also Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977) (addressing same situation in dictum). In *Letizia* v. *Prudential Bache*

Securities, Inc., 802 F.2d 1185, 1189 (9th Cir. 1986), the plaintiff was permitted to amend his complaint after discovery because it was unclear from the evidence whether the new claim would succeed on the merits. Similarly, the plaintiff in *Gamma-10 Plastics, Inc.* v. *American President Lines, Ltd.*, 32 F.3d 1244, 1255-56 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995), was permitted to amend its complaint at trial to assert a punitive damages claim because there was evidence to support the proposed claim. The cited cases therefore do not depart from the well-established rule, applied by the D.C. Circuit, that a motion to amend may be denied as futile when it has no prospect of success on the merits.

Nor is there any conflict with the line of cases stating that a district court may not enter summary judgment against a party sua sponte without giving the party sufficient notice to present his evidence. Pet. 16-18. There is no conflict for the simple reason that the district court did not enter summary judgment against Willoughby on his proposed Title VII claim, but rather determined that he could not add that claim to his complaint. That the court may have "applied evidentiary standards normally used in summary judgment proceedings" in making this determination, *id.* at 10, as just discussed, fully comports with the settled interpretation of Rule 15(a) in the courts of appeals.

The remaining issues that Willoughby raises simply go to the court of appeals' application of those established legal principles and thus present no "compelling" issue justifying expenditure of this Court's limited resources on certiorari. S. Ct. Rule 10. Thus, Willoughby cites *Corwin, D.D.S.* v. *Marney, Orton Investments*, 843 F.2d 194 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988), for the noncontroversial proposition that a party may amend a pleading "where the opposing party has provided consent to the amendments in writing." Pet. 15. Written consent is an independent basis for amendment under Rule 15(a), and the D.C. Circuit did not hold otherwise.

Willoughby argues only that the court below "ignored PEPCO's consent" to his proposed amendment, which

consent he alleges the Company gave in its response to his motion. Pet. 10. As explained above, however, PEPCO did not consent to the proposed amendment, either explicitly or impliedly. Rather, it argued that the Title VII claim was frivolous and "highly unlikely" to survive summary judgment and reserved its right to object to the claim at a later time. Pet. App. 76a. *Cf. Corwin*, 843 F.2d at 199 (finding consent in opposing party's "clear expression of acquiescence to an amendment" in a letter "and their statement in the letter that an amendment would be for their own benefit"). And even if the court of appeals erroneously disregarded PEPCO's response, such a case-specific error would not merit this Court's review.

Willoughby's argument that he had inadequate opportunity for discovery before his motion was denied, Pet. 11-12, likewise has no importance beyond this particular litigation. In any event, the argument is belied by the "extensive discovery" Willoughby received and by his failure to alert the district court pursuant to Rule 56(f) that further discovery was necessary. Pet. App. 8a.

Willoughby does not dispute that he received discovery on his original claims, Pet. 12 n.1 -- including thousands of pages of documents pertinent to his discharge and to the consent decree proceedings. Although he complains that "[n]o discovery had been taken on the proposed amendments," *id.* at 11, in fact, both his original claims and his proposed amendment arose out of essentially the same factual allegations concerning his discharge.

Thus, in his original complaint, Willoughby alleged that he was improperly discharged in violation of PEPCO's consent decree with black and female employees following an internal Company investigation into charges against him by plaintiffs in the class litigation. Pet. App. 39a-40a. He alleged that PEPCO used these charges "as its pretext for the firing" and that his discharge was "predicated upon hidden considerations directly related to the class settlement, and upon Willoughby's involvement" as an accused wrongdoer in the class litigation. *Id.* at 40a. Similarly, in the proposed amended complaint

Willoughby alleged that he was discharged "as a scapegoat to divert criticism from high management officials who had been responsible for previous employment practices and policies" at issue in the class proceedings. *Id.* at 62a. Because the allegations in the amended complaint were not "crucially different from" those of the original, Pet. 11, but rather basically restated them, Willoughby had adequate discovery on the proposed amendment.

II. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION IS CORRECT AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS CASE

The court of appeals concluded that the addition of a Title VII claim to Willoughby's complaint would have been futile because he could not prove discrimination. As this Court held long ago, certiorari is not granted "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the unanimous court of appeals decision is correct.

The court of appeals properly reviewed the district court ruling for abuse of discretion. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971). It agreed with the district court that Willoughby could not prove even a prima facie case of discrimination under the *McDonnell Douglas* framework. Pet. App. 8a, 22a-23a. Under that framework, Willoughby would have to prove by a preponderance of evidence, among other things, that he "was replaced by a person of equal or lesser ability who is not a member of a protected class." *Neuren* v. *Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1512 (D.C. Cir. 1995). *Accord Ward* v. *Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997). It is undisputed that Willoughby has not made and cannot make that showing because he was replaced by another white male. Pet. App. 22a; J.A. 224.

Willoughby instead contends that he can establish a prima facie case with evidence that PEPCO treated "supervisory employees of other races and sexes" who were guilty of

similar misconduct more leniently than he. Pet. 12 n.2. But even assuming that Willoughby has correctly stated the law,[4] he has failed to support his naked claim of differential treatment with any specific allegations or evidence, and he makes no argument that additional discovery would disclose such evidence.[5]

Willoughby similarly has offered no evidence or specific allegations to support his claim that PEPCO's stated reasons for his discharge are a pretext for intentional discrimination. Indeed, the record developed with respect to Willoughby's original claims shows that his race and sex played no role in his discharge. That evidence establishes that Willoughby's discharge was based on his improper questioning of plaintiffs in the class action lawsuit concerning PEPCO's investigation of their employment discrimination complaints -- a serious violation of Company policies at the heart of PEPCO's efforts to provide a work environment free from discrimination -- and on evidence that he made highly improper comments about his sexual relations. J.A. 295.

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[4] Willoughby incorrectly argues that this Court's decision in *O'Connor* v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996), eliminated the requirement that a Title VII plaintiff prove replacement by someone outside a protected class as part of the prima facie case. Pet. 12 n.2. *O'Connor* was an age discrimination case and did not alter the standards governing race and sex discrimination claims. *See Monette* v. *Electronic Data Sys. Corp.*, 90 F.3d 1173, 1185 n.11 (6th Cir. 1996) (distinguishing "traits such as gender or race, which are uniform among members of the protected class").

[5] The district court also properly concluded that Willoughby could not prove a prima facie case entitling him to an inference of discrimination under Title VII because he failed to offer sufficient evidence of "additional 'background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Harding* v. *Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (quoting *Parker* v. *Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). *Accord Pierce* v. *Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994); *Sanchez* v. *Philip Morris Inc.*, 992 F.2d 244, 248 (10th Cir. 1993). *See* Pet. App. 22a.

Willoughby contends that these allegations -- which were thoroughly investigated by the Company's EOP staff and reviewed by several levels of PEPCO management prior to Willoughby's discharge, *id.* at 51B n.1, 300 -- were false. Pet. 4. As the court of appeals recognized, however, even if Willoughby's discharge was based on unsubstantiated accusations by his subordinates, that fact would not suffice to establish intentional discrimination by the Company. Pet. App. 8a n.4. *See, e.g., Fischbach* v. *District of Columbia Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (employment decisions that are unwise or unfair do not violate Title VII absent discriminatory intent). *Accord Gustovich* v. *AT&T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992); *Holder* v. *City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989). *See also St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507-508 (1993) (plaintiff in Title VII case bears ultimate burden of proving not only that employer's asserted justification for challenged employment decision is not credible, but also that it is a pretext for intentional discrimination). Likewise, Willoughby's contention that he was selected by PEPCO upper management as a "scapegoat" for strategic reasons connected to the consent decree proceedings, Pet. 12 -- even if true -- would undermine rather than support his proposed claim, because it would tend to establish a reason for his discharge other than the discriminatory animus necessary to prove a violation of Title VII.

As the court of appeals concluded, the district court did not abuse its discretion in denying Willoughby's motion to amend his complaint, because he simply "points to no evidence that PEPCO fired him because of any animus against white males and appears to have had no prospect of uncovering any such evidence." Pet. App. 8a. In light of Willoughby's allegations and the evidence already adduced in the litigation, this determination was clearly correct and does not warrant this Court's review.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

PATRICIA R. AMBROSE
WILLIAM P. FLANAGAN*
AMY FOLSOM KETT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5715

* Counsel of Record

Counsel for Respondent